PUTTING IN ONE'S OWN CASE ON CROSS-EXAMINATION.

1. THE ORTHODOX RULE AND THE FEDERAL RULE. The great question that arises as to the scope of the cross-examination is whether the opponent may, upon the cross-examination, elicit the witness' knowledge as to *facts that constitute part of the opponent's own case*, or whether he is confined to the matters already dealt with in the direct examination or, at least, to topics connected therewith.

(*a*) In England, and in the United States down through the first quarter of the 1800s, there was apparently but one view upon this subject. There seems, indeed, to have been no question at all; so that in English judicial opinions an express statement of the rule is scarcely to be found. That rule—which may be termed the orthodox one—adopted the former of the above alternatives:

1829, Sutherland, J., in *Fulton Bank v. Stafford*, 2 Wend. 483, 485: "When a witness has been sworn in chief, the opposite party may not only cross-examine him in relation to the point which he was called to prove, but he may examine him as to any matter embraced in the issue. He may establish his defense by him without calling any other witnesses. If he is a competent witness to the jury for any purpose, he is so for all purposes."

(*b*) But in the year 1827, Chief-Justice Gibson of Pennsylvania, in dealing with a related point, chanced to remark (without citing an authority) that, as the ordinary rule, the cross-examining party should not "prove his case by evidence extracted on cross-examination," and also that a witness may not be cross-examined to facts which are "wholly foreign to what he has already testified:"

1827, Gibson, C. J., in *Ellmaker v. Buckley*, 16 S. & R. 72, 77: "A witness may not be cross-examined to facts which are wholly foreign to the points in issue (and, I would add, to what he has already testified) for the purpose of contradicting him by other evidence. . . . . In ordinary cases, the witness may be cross-examined by the party adverse to him whose wit-

ness he is at the time, and even then only to discredit him or to bring out something supposed to be withheld; . . . [but this is subject to enlargement in the Court's discretion in special cases], and for myself, I would not, without further consideration, pronounce the exercise of the discretion, depending as it does on circumstances which cannot be fully made to appear in a court of error, to be a legitimate subject of a bill of exceptions. If, then, a party may not prove his case by evidence extracted on a cross-examination after he has proposed his case to the jury, *a fortiori* he may not do so before."

The remarks put forth in this opinion (which were by no means consistent with themselves, and contained the germs of a practice that would have been repudiated by the great Chief-Justice) seem to have received no further attention at the time in other courts. But in 1840, Mr. Justice Story (also speaking *obiter*, and also without citing a single authority) was found to lay down in the Federal Supreme Court a rule of similar purport, though of slightly different phraseology—a difference, nevertheless, which has served more than anything else to introduce the extreme rule (equally unanticipated by the learned Federal judge) which now prevails in many jurisdictions. This rule—which may be termed the Federal rule, because through Mr. Justice Story's sponsorship it lost its local character and obtained its wide currency—was as follows:

1840, Story, J., in *Philadelphia & T. R. Co. v. Stimpson*, 14 Pet. 448, 461: "[The answers in controversy were inadmissible] upon the broader principle (now well established, although sometimes lost sight of in our loose practice at trials) that a party has no right to cross-examine any witness except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause."

Where the great Federal judge—the most versatile and encyclopedic mind among American jurists—obtained the "settled" rule thus first introduced into circulation, it is difficult to say.[1] He did not find it in the orthodox and accepted

1. 1874, Dunne, C. J., in *Rush v. French*, 1 Ariz. 99, 133, 25 Pac. 816: "We cannot know what the Court meant by saying that the principle involved in the second declaration was 'well settled.' They could not have meant well settled in England, for such had never been the rule there; nor in Massachusetts, Vermont, New York, Ohio, Wisconsin, or Missouri. The case they had in hand was from Pennsylvania, and the rule in that state was, it is true, settled, as the Supreme Court says; but whether they meant that, or that it was settled in the United States Circuit Court for Pennsylvania, or what they meant, we cannot tell."

common-law practice either of England or of the United States; for there appear to have been up to that time (except in Pennsylvania) no other rulings to that effect. It is clear that the earlier practice, as ascertainable from prior rulings in half a dozen jurisdictions, had been in harmony with the orthodox English practice. It is possible that Mr. Justice Story was merely expounding the Pennsylvania rule, as he was bound to do for a Federal trial Court sitting in Pennsylvania.[2] It is also possible, and even probable, that he had in mind a passage, uttered just a hundred years before, in which Lord Hardwicke's recollection, when sitting as Chancellor, of the practice at the common-law bar, is made to serve as authority:

1740, L. C. Hardwicke, in *Dean of Ely v. Stewart*, 2 Atk. 44, "laid down the following rules in this cause: . . . Where at law a witness is produced to a single point by the plaintiff or defendant, the adverse party may cross-examine as to the same individual point, but not to any new matter; so in equity, if a great variety of facts and points arise, and a plaintiff examines only as to one, the defendant may cross examine to the same point, but cannot make use of such witness to prove a different fact."[3]

The practice at common law at the time when the Chancellor spoke, does not bear him out in his assertion;[4] nor can his authority to speak of the common-law rule be regarded as weighty, for his experience at that bar had been comparatively scanty.[5] So far as the practice in chancery may have seemed to Justice Story to have a bearing, it was hardly fitted to come into competition with the common-law rule as a claimant for favor. The rule in chancery was indeed apparently what Lord Hardwicke declared it to be (though, oddly enough, there appears to have been no other ruling than his own during the course of a century).[6] But the system of cross-examination in

2. Compare the remark of C. J. Dunne, in note 1, *supra*.

3. The same judge is elsewhere reported as follows: 1743, L. C. Hardwicke, in *Vaillant v. Dodemead*, 2 Atk. 524 (said that "wherever at law a party calls upon his own attorney for a witness, the other side may cross-examine him, but that must be only relative to the same matter, and not as to other points of the cause"; but this is explained easily enough as stating the limited effect of the waiver of the privilege.)

4. Of the later practice there can be no doubt whatever.

5. He was only three years at the common-law bar, then fifteen years at the chancery bar, then Chief Justice of the King's Bench (mainly in criminal cases) for three years; and had been four years Lord Chancellor in 1740.

6. Gresley, Evidence in Equity, 50, and Daniell, Chancery Pleading and Practice, I, 22, cite only this case of *Ely v. Stewart*.

chancery had long been notoriously a failure, and was already practically abandoned as a weapon of defense.[7] It was, therefore, singular that Justice Story (if indeed he was thinking of the chancery rule) should not merely have deviated without precedent into a practice having in this respect conditions peculiar to itself and differing radically from the common law, but should have gone for guidance to a system of cross-examination which had for a generation or more been stunted and devitalized. In any event, the rule thus presented by him to the country at large must be regarded as a sudden innovation upon the hitherto general and accepted practice of the common law, both in England and in the United States. Whatever its later currency, it came before the profession at that time as an interloper, with all the weight of experience against it. It was bound to justify itself, in reason and in policy. Whether it has done so may now be considered.

2. ORIGINAL FORM OF THE FEDERAL RULE. Before considering the respective policies of these opposing rules, it is necessary to keep in mind that in their original form they were never put forward by their eminent sponsors as anything but rules of customary and normal practice, subject always to the general principle that the *trial Court may, in its discretion, allow exceptions.*. Chief Justice Gibson, the very progenitor of the Federal rule, declared radically that he "would not without further consideration pronounce the exercise of the discretion, depending as it does upon circumstances which cannot be fully made to appear in a court of error, to be a legitimate subject of a bill of exceptions." In the Pennsylvania and the Federal Supreme courts—the two most notably associated with this rule—this controlling principle of discretion has from time to time been expressly emphasized. In this pure form of these rules, then, the supposed dis-

7. 1837, Gresley, Evidence in Equity, 50, note ("Cross-examination, except on this point [to credit], has fallen very much into disuse"); Plumer, V. C., quoted in Gresley, *ubi supra* 75 ("The glaring defect in the system of taking evidence in chancery, and that which renders it insufficient for the elucidation of truth, is the total exclusion of everything like an effective cross-examination. Each party is ignorant, not only of what the witnesses on the other side have said, but of what they have been asked. In such total darkness, a cross-examination is seldom attempted ; the most experienced practitioners, I believe, recommend it only in cases where the witness is one whom it would be necessary or prudent to have examined in chief; . . . [this] leaves the examination in chancery a mere *ex parte* proceeding, and little better than evidence by affidavit").

advantages, which have been by the champions of either put forward as marking the enforcement of the other rule in extreme cases, are reduced to a minimum, and may often be practically inconsiderable. The trial Court's discretion is intended to give a flexibility that will obviate these occasional disadvantages. Thus the only question of controversy that would properly have remained would be whether the one or the other is better suited to be the foundation for the usual (not the necessary or invariable) order of evidence. But, unfortunately, this same qualification, always assumed by the inventors of the rule as an inseparable part of it, has usually been lost sight of by their followers—at least among the adherents of the Federal rule. While seldom expressly denying the principle of discretion, they have come practically to ignore it. By ignoring it, they have reduced the rule itself to a fixed and deadened formula; and they have thus emphasized and made actual and frequent the possibilities of practical harm which were otherwise only latent in it. In considering, therefore, the policy of the Federal rule as actually administered by most of the courts adhering to it, account must be taken of the drawbacks which attend its actual workings in this extreme form, even though they were not inherent in the rule as originally advanced and correctly applied.

Furthermore, the rule has suffered degeneration in another respect, in the hands of most of its modern adherents. For it would seem that both of the eminent judges, Gibson and Story, who promulgated it, understood it to exclude only the putting in of the opponent's *own case—i. e.*, the new facts constituting his affirmative defense (whether strictly appropriate to an affirmative plea or not); yet their language made it possible for their followers to forbid an examination to anything but the *precise matters testified by the witness on the direct examination*, even to matters which properly concerned the calling party's own case under the allegations of his pleading. This extreme interpretation of the rule has also led to the emphasizing of special disadvantages, which must be reckoned with in weighing the respective policies of the two rules as actually administered. The arguments against the Federal rule are both entitled and obliged to deal with it in the degenerate form in which to-day it is practiced in most of its jurisdictions.

3. Policy of the Federal Rule. The Federal rule has labored under one notable disadvantage—namely, it has seldom found, among judges of accepted eminence, a defender other than

its progenitor, Chief Justice Gibson. In searching the reasons upon which the rule is supposed to be founded, attention is attracted by the circumstance that the greatest names are found as expositors of the reasons against the rule. The best single statement of what can be said on behalf of the rule seems to be the following:

1856, Handy, J., in *Mask v. State*, 32 Miss. 405, 430: "I consider this latter [or Federal] rule as founded on the sounder reason and as establishing the better practice. Cross-examination, *ex vi termini*, must relate to what has been stated by the witness on his examination in chief, and it could not properly be denominated cross-examination when it extended to new matter, about which the witness had given no testimony. Suppose the first witness introduced by the plaintiff testifies only to an isolated fact, as, for example, the execution of a document relied on by the plaintiff as evidence; would it be competent for the defendant to anticipate the merits of the case to be developed by the plaintiff, and, by way of cross-examination, to examine the witness as to matters which he supposed to be involved in establishing the plaintiff's case, and go into the merits of the whole case? Such a course would scarcely be sanctioned or tolerated by any court. And why? Because it would tend to subvert the regular order of presenting the case, and lead to confusion. . . . . The same principle which governs the pleadings between the parties should regulate the exhibition of the proof upon the trial; and as each pleading should be strictly in answer to that to which it applies, so the cross-examination of each witness should be confined to the matter testified to in his examination in chief, in order to produce certainty and distinctness in ascertaining the facts to be proved. This course, while it is sanctioned by the rules of logical proceeding, can be productive of no prejudice to a party desiring to prove by the witness other matters than such as are embraced in the examination in chief; for it is well settled that he may, afterwards, introduce him as his own witness, to prove any matters pertinent to the merits of the cause, and that the adverse party having called him, is thereby precluded from objecting to his competency, or from impeaching his credibility.

These reasons suggest the following comments:

(*a*) A reason advanced by Chief-Justice Gibson is that it is "*foreign to the end of cross-examination* . . . to allow the witness to be cross-examined to every transaction within his knowledge." This, however, is a mere begging of the very question at issue. Furthermore, the general nature of the common-law arrangement of examinations suggests precisely the contrary—namely, that the function of cross-examination is to exhaust the witness' knowledge on all points on which he

has any that is relevant to the trial. A much more natural assumption is the one made by the judges later quoted—namely, that the "primary obligation of the oath is to elicit the whole truth."

(*b*) Another reason put foward is that this rule "tends to *promote order and method.*" If by this be meant that the rule is in theory more orderly, in that it aims to keep the facts of the opponent's case from confusing the jury and complicating the proceedings until the proponent has fully set forth his own case, this much may be conceded for the rule in its pure form,[8] although in its usual form there is not even the semblance of such a scientific demarcation, since the rule turns on whatever line of facts the proponent may have chosen to take up in the direct examination. But if it be meant that simplicity is actually attained and that confusion is in fact avoided, the precise contrary has been shown by experience.

(*c*) Another suggested reason is that the *calling party otherwise loses the benefit of cross-examination* on the facts forming part of the opponent's case. But why should he *not* lose the benefit of cross-examination? He has called the witness, and the sole purpose of cross-examination is to enable the non-calling party to bring out facts ignored or suppressed by the calling party's examination. By direct examination and by re-direct examination the calling party may bring out any fact whatever that assists his case. The notion that he has any need for a cross-examination is simply unfounded. The re-direct examination is for him a cross-examination to all intents and purposes.

(*d*) A fourth reason, and the one most frequently reiterated, is the apprehension that "if a defendant could make out his case on cross-examination, he might employ *leading questions* for the purpose." This is indeed a lamentable bugbear; for it is purely the creature of imagination. The adoption of the Federal rule will not of itself muzzle the opponent and stifle his obnoxious leading questions; for it is clear that he may ask them in any event. The prohibition of leading questions is designed to prevent a willing witness from accepting the sug-

8. Even this reason would substantially disappear if sanction were given to the recent sensible proposal of an experienced judge of the New York Supreme Court, Mr. Justice Leventritt ("The Brief," Vol. II, p. 330, June, 1900)—namely, that the defendant be allowed a concise opening statement of his case in opposition, immediately after the plaintiff's opening. Moreover, this reason hardly applies at all to a plaintiff's cross-examination of a defendant's witness.

gestions put into his mouth by counsel; it applies, therefore, *prima facie*, to the counsel of the calling party, and it does not apply, *prima facie*, to the cross-examining party. The rule as to asking about one's own case on cross-examination is purely a matter of the order of presenting facts. But the rule as to leading questions concerns the partisan disposition of the individual witness, and depends on the supposed willingness of a partisan witness to assist his party. Thus the rule exceptionally may be relaxed if the witness appears hostile to the calling party, and exceptionally may be enforced if he appears eager to befriend the cross-examining party. Its criterion is solely the individual witness' state of mind—not the kind of fact that is to be asked, nor the stage of asking. The very same fact may be asked of witness Doe on cross-examination by a question leading in form, but may not be asked of witness Roe in that form. It is therefore a complete misconception of the principle of leading questions to suppose that the use of leading questions on cross-examination furnishes any objection to the opponent's asking at that stage about the facts of his own case, or that it supplies any reason for favoring the calling party by forcing the cross-examiner to call the witness again so that the former may ask leading questions.

(*e*) Another objection, analogous to the preceding one, but less often mentioned, is that, but for this Federal rule, the cross-examining party could, on cross-examination or otherwise, *impeach the witness* through whom the facts of his own case are thus proved, though he could not do so if he had been compelled to call him for the purpose at a later stage. But, again, the question occurs, Why should he not? The cross-examiner has not called the witness, nor, by calling, represented him as worthy of credit. Why should he not expose his lack of credit, while at the same time utilizing the testimony in his favor for what it may be worth? Furthermore, the opponent, even after calling the witness himself, may still show his specific falsities, and probably his self-contradictions; and thus but little of real service has been accomplished. The appearance in this connection of the unreasoning and ill-deserving rule against impeaching one's own witness is merely another illustration of its power to make disturbance and confusion without profit to anyone.

4. Policy of the Orthodox Rule. The Federal rule was introduced by two great judges into a system of practice which had apparently up to that time known it not. On the names of

those judges, however, it speedily was carried into favor in many courts.[9] Its original attraction to its propounders lay probably in its apparently scientific allotment of *suum cuique* in the presentation of the respective cases. But it remained to be tested by experience and to be compared in operation with the original and orthodox rule. Within a generation it had ample opportunity for this test; and its practical weaknesses soon became apparent enough. In the following passages will be found the expositions of these defects as noted in experience by some of the most eminent names in the law of evidence. The names of Shaw, Bigelow, Martin, Campbell, Christiancy and Cooley form a brilliant list; and the weight of their opinions counts heavily against an unfortunate rule which has threatened to dominate our entire system of practice:

1861, Messrs. Douglass, Fenton, Sutherland and Avery, arguing in *Campau v. Dewey*, 9 Mich, 381: "In our judgment it [the English rule] is the only rule which leaves the course of cross-examination sufficiently free and unobstructed to make it effective for the attainment of truth in respect to the matters in controversy. The rule laid down in *People v. Horton* [Mich.], however plausible in theory, is exceedingly mischievous in practice. It is altogether too nice and refined for practical application. Under it, in most litigated cases, questions of relevancy, often of the most difficult and perplexing nature, are perpetually springing up during the progress of the trial, occupying the time of the Court, and distracting the jury with their discussion; and each of these questions must be decided by the presiding judge upon the spot, at the peril of a reversal of the judgment, to the great injury of the party if, from misrecollection of the witness' testimony in chief, misapprehension of the nature of the issue, or any other cause, he commits an error, although the error, if in the way of overruling an objection, in most instances works no practical injustice. But this is not all. The worst effect of the rule is that it greatly impairs the efficiency of cross-examination. If there are any evils in the practical working of the English rule of sufficient magnitude to call for its modification or abandonment, they are all avoided, as well as the evils of the rule laid down in *People v. Horton*, by adopting the rule that whether a party shall be allowed to cross-

9. Professor Greenleaf's treatise appeared in 1842, two years after Mr. J. Story's opinion was rendered; and no doubt the former's treatise served as an efficient medium for propagating the latter's rule. "The rule is now considered by the Supreme Court of the United States to be well established," is its language (§ 445); and yet the author was unable to cite a single other authority than the ruling of *Floyd v. Bovard* and *Phila. & T. R. Co. v. Stimpson*. Thus the great judge's name and the author's reverence for his opinion (the treatise was dedicated to him) combined to manufacture the rule out of whole cloth.

examine his adversary's witness as to the whole case, or by leading questions, rests in the sound discretion of the Court."

1861, Christiancy, J., in *Campau v. Dewey*, 9 Mich. 381, 417:

"[1] When a witness is called and examined by a party, the law and the oath impose the obligation to state the whole truth—all the facts within the knowledge of the witness bearing upon the question in controversy upon which his testimony is sought. The witness may be cognizant of some facts which, considered without reference to others equally within his knowledge, would tend strongly to prove the issue in favor of the party calling him; while at the same time there may be other facts equally within his knowledge, which, considered without reference to the former, would have an opposite tendency, or which considered in connection with them, would explain away or modify the former and give a very different effect to the whole. Should a witness in such a case disclose only that class of facts which operated in favor of the party calling him, his testimony, though true in the detail, would be false in the aggregate, and have all the effect of intentional falsehood; and, if aware of the nature of the controversy in which he is called to testify, he would be guilty of perjury as much as if he had wilfully falsified the facts stated by him: and this whether he were cross-examined or not. It is the disclosure of the facts known to the witness (bearing on the issue) *as a whole* which the law seeks, and a direct examination which should be perfectly fair would in such a case disclose both classes of facts and present the witness' knowledge as a whole. But the party calling the witness may so adroitly direct the examination in chief as to disclose only that class of facts which tend to establish the issue in his favor and to conceal those which would destroy or modify their effect. And as courts, from their ignorance of the extent of the witness' knowledge and of the plan arranged by the party calling him, have no means of enforcing the perfect fairness of a direct examination, the law has given to the opposite party the right to cross-examine the witness, for the purpose, among others, of bringing out the facts thus concealed, which tend to explain away or modify the effect of those stated on the direct examination or to rebut the inference which would otherwise result from them. . . . Such, I think, are the purely logical principles of cross-examination. . . . But there are many objections to the rule as applied in *People v. Horton*. [2] It impairs the efficiency of cross-examination as a means of detecting error and exposing falsehood, and renders it comparatively easy for a corrupt party, by the aid of corrupt witnesses, to fabricate fictitious cases without the risk of impeachment, compelling the opposite party to make the witness his own as to facts which might tend to modify the effect of his evidence; thus precluding the power of impeachment. [3] It tends to break up into detached and widely-separated fragments the state of facts within the

knowledge of the witness bearing upon the same main point, and which would be much better understood if stated as one connected whole. The testimony of other (and perhaps many other) witnesses intervening between the parts of the witness' testimony, the jury are more likely to confound the testimony of one witness with that of another. The bearing of the different parts of the witness' testimony upon each other, and any discrepancies which may exist, are not so easily discovered, and consequently the credit of the witness is not so correctly estimated. [4] But there is a practical difficulty in the application of this rule (as understood in *People v. Horton*), inherent in the rule itself, and which can only be avoided by getting rid of the rule as there applied. It adopts, as the test of the relevancy of a cross-examination, the bearing of the particular facts sought to be elicited by it upon the particular facts brought out on the direct examination; instead of the main fact or facts which these particular facts tend to prove; and as these particular facts are often very numerous, and their number and character incapable of restriction, and the question of relevancy may arise upon any two of them, and as the degrees of relation between them may be as numerous and varied as the facts themselves, it is easy to see that questions of this kind must be constantly arising, till the case bristles with points of relevancy. The rule therefore leads to almost infinite embarassment; and it must and often does require more time to dispose of these questions of relevancy (under this rule thus understood) than would otherwise be required for the trial of the cause."

1878, Cooley, J., in *New York Iron Mine v. Negaunee Bank*, 39 Mich. 644, 659 (after quoting Mr. J. Campbell's words similar to those *supra*): "One might suppose, after reading this language, that it was written in anticipation of the proceedings in this very case. . . . Here the matter in issue was confined to the single point of Wetmore's authority to make and indorse the paper sued upon.[10] . . . But although he was the first witness called, and the case involved nothing but paper made or indorsed by himself, he was not asked respecting his signatures, and the notes were not offered in evidence while he was upon the stand. The reason for this was apparent as soon as the cross-examination commenced; for when the witness was asked any questions concerning the notes, the purpose of which was to show that he had signed or indorsed them without authority and in fraud of defendant, and that he had admitted that such was the fact, objection was at once interposed on behalf of the plaintiff; and the circuit judge, remarking that the witness had given no testimony in reference to the notes nor had any testimony been introduced by any other party in reference to them nor had the notes been put in evidence, sus-

10. The next two sentences are for clearness' sake transferred here from the preceding page of the opinion.

tained the objection. The questions on behalf of the plaintiff had been carefully restricted to that part of the facts which it was supposed would tend in its favor, and in respect to which a cross-examination could not be damaging, and were intended, instead of eliciting the whole truth, to conceal whatever would favor the defense. The witness, instead of being required, according to the obligation of his oath, to tell the whole truth, had been carefully limited to something less than the whole; and when questions were asked calculated to supply his omissions, they were ruled out because they did not relate to the precise circumstances which the plaintiff had thought it for his interest to call out. It would be difficult to present a more striking illustration of the error in the rule in *People v. Horton* than is afforded by this case. For here was the principal actor in the transaction under investigation brought forward as a witness to support his own acts, but carefully examined in such a manner as to avoid having him utter a single word regarding the main fact—though it was peculiarly within his own knowledge—and even his handwriting was left to be proved by another. In that manner he was made to conceal not merely a part of the transaction but a principal part, and made to tell, not the whole truth according to the obligation of his oath, but a small fraction only—a fraction, too, that was important only as it bore upon the main fact which was so carefully kept out of sight while this witness was giving his evidence. It is true, the defense was at liberty to call the witness subsequently; but this is no answer; the defense was not compellable to give credit to the plaintiff's witness as its own for the purposes of an explanation of facts constituting the plaintiff's case and a part of which the plaintiff had put before the jury when examining him. One of the mischiefs of the rule in *People v. Horton* was that it encouraged a practice not favorable to justice, whereby a party was compelled to make an unfriendly witness his own, after the party calling him had managed to present a one-sided and essentially false account of the facts, by artfully aiding the witness to give such glimpses of the truth only as would favor his own side of the issue. What has been said on this point has in substance been said many times before. The necessity of repeating it is a singular illustration of the difficulty with which a mischievous but plausible precedent is sometimes got rid of."[11]

The chief objections to the Federal rule may be summarized as three in number; and although these apply in aggravated degree to its degenerate form only, and not to its original and pure form, nevertheless, as already suggested (*ante* § 2), the rule must be reckoned with as it usually is applied, and not as it might be. (1) The necessity of determin-

11. In *Detroit & M. R. Co. v. van Steinburg*, 17 Mich. 99, 109, the same judge had forcibly expounded the evils of the rule here repudiated.

ing, for each question on cross-examination, whether the fact inquired for is properly a part of the case of one or the other party produces delay, propagates confusion, and increases the opportunities for securing a re-trial on trifling errors of ruling which do not affect the merits of the cause or the truth of the facts. Even under a strict system of pleading, this possibility is great; but under the prevailing loose system of pleading, they are legion. Morover, under the degenerate form of the rule not even the rules of pleading can furnish a guide; the line of distinction changes with every witness, it is both variable and uncertain; and it requires either an impossible feat of memory or a constant perusal of a stenographic report to ascertain the standard of decision. Thus are caused additional labor in preparation for trial, delay and confusion in its progress, and an increased contingency that the work must be done over again at a new trial. (2) The opportunities for successful unfair tactics are increased, by enabling the calling party to suppress part of the facts, so as to oblige the cross-examiner to call the witness later as his own.[12] The latter's right to do this is for him usually no just equivalent; first, because the proper time to extract the desired facts effectively is the time mmediately after the direct examination; and, secondly, because with a hostile witness it is often dangerous, if not impossible, to attempt to obtain the facts fully at the later stage. The result is (as the calling party hopes) often to prevent the cross-examiner from obtaining the desired facts at all, because he does not feel justified in risking the exercise of his right to call the witness subsequently; and this evil is the more emphasized where the witness is himself the party opposed to the cross-examiner. (3) It hampers the cross-examiner subjectively in exercising the fundamental right of cross-examination; because, in many jurisdictions following this rule, the erratic corollary is enforced that, by asking about his own case on cross-examination, the opposing party makes the witness his own and therefore becomes unable to discredit him, the consequence being that the cross-examiner feels himself in constant danger of overstepping the line and losing his right to expose a false witness, and thus is obliged to leave a large margin for safety. That this produces an unnecessary labor and responsiblity, and has inevitably a dulling effect upon what should be the sharp weapon of cross-examination, must be apparent. In this respect the rule has a vicious indirect effect in helping to dis-

12. Particularly in the case of an accused offering himself as a witness.

arm the opponent of his greatest protection against fraud and perjury. A perusal of some of the modern rulings enforcing this pedantic application discloses better than anything else the degenerate and pettifogging influence of the rule in question.

These objections, together with other minor ones noted by the various judges, ought to be enough to stem the progress of this rule. In its two generations of existence it has gone into many courts; but in most of these it is not too late to turn—if not to repudiate the rule at least to revise and restore it to its original and pure form. It was accepted in almost every instance merely upon authority, and under the belief that it was, in the eminent jurist's language, "well established." Since the test of experience has passed, few have been found to defend it; nor can it be successfully defended. It has sometimes been called the American rule. It is not yet entitled to that name, and it is to be hoped that it never will be.

5. MICHIGAN RULE; CROSS-EXAMINATION TO FACTS MODIFYING THE DIRECT EXAMINATION. It has already been noted that, so far as the Federal rule has any claim to scientific orderliness, it rests on the assumption that to each party is apportioned a stage of the trial for the presentation of the facts supporting his own case, and that it is proper for him to present the evidence of those facts in that stage only. Hence, the extent of the prohibition, as it affects the cross-examiner, is limited to those facts which would have formed a *part of his own affirmative case* at a later stage. In this, the pure and only plausible form of the rule, the cross-examiner may still inquire as to all facts which *modify* or *explain away the effect of the facts brought out on the direct examination;* and the prohibition applies only to his *own affirmative case*, since the former class of facts would not in themselves be a part of the cross-examiner's own case. This form of the rule is still open to the first and perhaps other objections already noted. But, unfortunately, the originating words of Justice Story and of Chief-Justice Gibson prohibiting all except "facts connected with the matters stated in his direct examination," gave to the rule a much broader and a wholly unscientific form. In the result (contrary, perhaps, to their real expectations) the latter form, based upon their literal expressions, came to be accepted in most of the courts following their rule producing in its application the most serious of the disadvantages latent in it. Against this degenerate form and its practical results, a number of courts have earnestly protested. These have striven, while accepting the rule, to

enforce it in its pure and only defensible form, and to diminish its rigor by a generous interpretation. There is a difficulty in defining the line of distinction, especially under a loose system of pleading; but the general purpose and theory is plain enough. This form of the rule may be termed the Michigan rule since the Court of Michigan has not only most fully expounded it but has by its sound exposition done particular service in arresting the progress of the inferior form:

1862, Campbell, J., in *Chandler v. Allison*, 10 Mich. 460, 477: "The principal point in controversy was whether Allison had an unqualified present interest as a tenant of Chandler. That he was a tenant was conceded, and the only point in issue on that subject was whether, under the terms of his holding, Chandler had a right to require him to leave, in order to rebuild upon the premises. The questions put to the witness [Allison, the plaintiff, testifying for himself in an action of trespass against Chandler for expelling him] were aimed at ascertaining the precise terms of the letting. . . . It is difficult to perceive any principle upon which such questions can be held improper on cross-examination. The only object of this process is to elicit the whole truth concerning transactions which may be supposed to have been only partially explained, and where the whole truth would present them in a different light. Whenever an entire transaction is in issue, evidence which conceals a part of it is defective, and does not comply with the primary obligation of the oath, which is designed to elicit the whole transaction.. . . . When the answers are given, the nature and extent of the transaction becomes known from a comparison of the whole, and each fact material to a comprehension of the rest is equally important and pertinent."

1881, Brewer, J., in *Blake v. Powell*, 26 Kan. 320, 326: "A cross-examination is not limited to the very day and exact fact named in the direct examination. It may extend to other matters which limit, qualify, or explain the facts stated on the direct examination, or modify the inferences deducible therefrom, providing only that such matters are directly connected with the facts testified to in chief."

6. State of the Law in the Various Jurisdictions. (*a*) With reference to the *discretionary power of the trial Court* to allow variations from the customary order, it is clear that this is an inherent assumption in each rule as properly understood. The courts following the orthodox rule seldom forget this; and the courts in which the Federal rule originated (Pennsylvania and the Federal Court) are still found recognizing it fully, and declining ordinarily to consider as an error any variation sanctioned by the trial court. But in many of the courts fol-

lowing the latter rule, the qualification as to discretion is usually ignored, and the rule is enforced in its most bigoted form.

(*b*) With reference to the customary *scope of the facts* that may be sought on cross-examination, the inferior form of the Federal rule is found now applied in the majority of jurisdictions. In a large minority the orthodox rule prevails. In a small minority (notably Michigan and California) the better form of the Federal rule (termed above the Michigan rule) is carefully enforced. As between the two forms of the Federal rule, it is sometimes difficult to ascertain which has been adopted, and there are sub-varieties of it. As applied to the *party-opponent* testifying in a civil case, the extreme rule is apt to be modified; as applied to an *accused* taking the stand in his own favor, the rule is often attempted to be juggled with,[13] and is also subject to confusion with other principles.

7. QUALIFICATIONS OF EACH RULE. (*a*) Under the *orthodox rule*, it is of course assumed that there can be no inquiry on cross-examination as to facts not properly then in issue under the pleadings.[14] But where there are joint opponents, the facts in issue are presumably available on cross-examination by any one of them.[15] Where the witness is himself the party on whose behalf the counsel is cross-examining, and has been called by the first party, there seems to be no reason why the same scope of questioning should not be allowed;[16] although

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13. Compare the rulings in California and Missouri, intended to prevent this. As applied to an accused the rule is particularly absurd, because the prosecution cannot call him as its own witness.

14. 1859, *Bracegirdle v. Bailey*, 1 F. & F. 536 (matter not pleaded at all); 1830, *Hartness v. Boyd*, 5 Wend. 563 (through lack of an affidavit of merits, the cause was conducted on the plaintiff's pleading as an "inquest" only); 1841, *Kerker v. Carter*, 1 Hill 101 (similar).

15. 1842, *Fletcher v. Crosbie*, 2 Mo. & Rob. 417 (counsel for a defendant who had suffered judgment and was interested only as to the amount of damages was allowed to cross-examine to the whole case with a view to establishing the liability of other defendants, since he would be liable for costs on his plea in abatement if they were not guilty).

16. *Contra:* 1863, *Bell v. Chambers*, 38 Ala. 660, 664 (he does not become "a general witness in the cause," and therefore cannot be examined "on any matter of defense not called out by the plaintiff in his examination"). But the cases cited in the preceding section do not make this exception.

the questions should not be leading in form.[17] Where the witness is the party-opponent to the cross-examiner, no difference is called for.[17]

(*b*) Under the *Federal rule*, it is clear that it does not prohibit cross-examination to one's own case where the calling party has been allowed in his direct examination to bring out facts in rebuttal of a prospective defense,[18] nor where with the trial court's consent the opponent has postponed the cross-examination until after he has begun his own case in reply. Furthermore, it is certain that the discrediting of the witness by any allowable mode whatever is not a part of the opponent's own case, within the meaning of the rule, and may therefore be pursued without restraint on cross-examination.[19] Nevertheless, such is the latent power of confusion inherent in the rule, that even this elementary postulate is sometimes lost sight of; so that a court is found to refuse to let the opponent on cross-examination ask about a prior self-contradiction; the result being that, when the opponent recalls him for the purpose, he is met by the rule against impeaching one's own witness, and the court is obliged to evade an unendurable ruling by the novel suggestion that if in discretion the question is excluded on the cross-examination, it must then be allowed at the later stage.[20] Under the Federal rule, finally, is sometimes found an exception for a party-opponent as a witness.

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17. Whether such a party-witness *may be impeached* by the cross-examiner is of course a different question.

18. 1896, *Kenny v. Walker*, 29 Or. 41, 44 Pac. 501.

19. 1881, *State v. Willingham*, 33 La. An. 537. Few counsel have been hardy enough to raise the doubt.

20. An example of this is the following case: 1900, *Clary v. Hardeville Brick Co.*, 100 Fed. 915.